

**Letter of Findings: 10-0482**  
**Sales and Use Tax**  
**For 2006, 2007, and 2008**

**NOTICE:** Under IC § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of the document will provide the general public with information about the Department's official position concerning a specific issue.

**I. Use Tax – Sampling methodology.**

**Authority:** IC § 6-2.5-3-2; IC § 6-8.1-4-2; IC § 6-8.1-5-1; IC § 6-8.1-5-4; [45 IAC 2.2-3-4](#); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer protests the Department of Revenue's sampling methodology used to assess use tax on asset purchases.

**STATEMENT OF FACTS**

Taxpayer is a foreign limited partnership (LP) in the retail grocery business. During the 2006, 2007, and 2008 tax years (Tax Years), taxpayer operated approximately 2,469 retail stores in 31 states. Taxpayer operated approximately 179 retail grocery stores in Indiana. Taxpayer also operated a distribution center in Indianapolis, Indiana. The Department of Revenue (Department) conducted an investigation of taxpayer's records for the Tax Years. Taxpayer signed successive extensions of time to keep the 2006 tax year open while the Department continued reviewing taxpayer's extensive records.

As the Department continued its investigation, the Department encountered numerous instances in which taxpayer could not produce batches of records in response to the Department's queries. In the interest of completing its investigation in a prompt and efficient manner, the Department completed a statistical sample for taxpayer's capital assets purchased during the Tax Years, offering the sample to taxpayer for approval. Taxpayer elected not to sign the Department's agreement to the projected results. As a result of its investigation, the Department assessed additional use tax on taxpayer's asset purchases. Taxpayer protested the additional assessments. The Department conducted an administrative hearing, and this Letter of Findings results. Further facts will be supplied as required.

**I. Sales & Use Tax – Sampling methodology.**

**DISCUSSION**

During the hearing, taxpayer confirmed receipt of an investigation notice letter from the Department in July 2009. Taxpayer also conceded difficulties in the retrieval of taxpayer's records due to use of different electronic accounting systems hardware and software. Taxpayer admits to difficulties producing "files that the [investigating] states can use." Taxpayer's stores in Indiana report to four (4) respective divisions. Each division employs a different accounting structure and data-collecting process.

A few weeks after beginning its investigation, the Department indicated that some form of sampling would provide a more efficient method of producing useful information and figures. At this stage, taxpayer agreed with the Department. The Department's investigator subsequently provided taxpayer with a list of accounts chosen for the sample. As the investigation progressed, the Department made numerous requests for batches of invoices and other documents related to taxpayer's expenses and assets. Near the end of the third month of the investigation, the Department submitted the first of two Agreements for Extension of Time to taxpayer, which taxpayer approved and executed.

Three months after signing the first Extension of Time, taxpayer produced some of the missing invoices. During the same three month period, both the Department and taxpayer recognized the need to revise the list of accounts to facilitate refinement of the sampling and time management strategies. Working with a revised pull list of accounts, the Department continued its review, while taxpayer continued searching for, and retrieving, missing documents. Deliberate efforts by both parties allowed for, and produced, a second Agreement for Extension of Time.

While the extensions gave both parties more time to become familiar with each other's processes, the extensions did not ease difficulties both sides shared with respect to efficient time management. Approximately two months after receiving the second Extension of Time, a time period embodying continuing review and document retrieval, taxpayer informed the Department that taxpayer had completed its research; that taxpayer had found all the documents that it could. The Department created a stratified sample of taxpayer's expenses and assets and completed its investigation.

All tax assessments are prima facie evidence that the Department's claim for the tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Use tax is imposed under IC § 6-2.5-3-2(a), which states:

An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal

property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

Also of relevance is [45 IAC 2.2-3-4](#), which states:

Tangible personal property, purchased in Indiana, or elsewhere in a retail transaction, and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax for such property, unless the Indiana state gross retail tax has been collected at the point of purchase.

Taxpayer argues that the Department did not devote enough time to the Department's investigation. IC § 6-8.1-5-4 states:

(a) Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records. The records referred to in this subsection include all source documents necessary to determine the tax, including invoices, register tapes, receipts, and canceled checks.

(b) A person must retain the books and records described in subsection (a), and any state or federal tax return that the person has filed:

(1) for an unlimited period, if the person fails to file a return or receives notice from the department that the person has filed a suspected fraudulent return, or an unsigned or substantially blank return; or

(2) in all other cases, for a period of at least three (3) years after the date the final payment of the particular tax liability was due, unless after an audit, the department consents to earlier destruction. In addition, if the limitation on assessments provided in section 2 of this chapter is extended beyond three (3) years for a particular tax liability, the person must retain the books and records until the assessment period is over.

(c) A person must allow inspection of the books and records and returns by the department or its authorized agents at all reasonable times.

(d) A person must, on request by the department, furnish a copy of any federal returns that he has filed.

The Department prepared the use tax assessments based upon authority contained within IC § 6-8.1-5-1(b) which states that "If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available."

The taxpayer did not provide any additional documentation to support taxpayer's position that the Department did not devote a reasonable period of time to investigate taxpayer's records. While taxpayers may have varying degrees of facilitating record keeping, and in maintaining those records, the records of any taxpayer must be sufficient to permit the Department to reconstruct that taxpayer's business. Here, taxpayer's records did not permit such a reconstruction. The investigation's history supports taxpayer's concession as to its own difficulties producing taxpayer's records, and that the retrieval and review of only five (5) percent of the applicable invoices took almost a year. That taxpayer asserts insufficient time also contradicts taxpayer's assertion during the latter stages of the twice-extended investigation period that taxpayer had completed its research and produced all of the records that it could.

Taxpayer also protests the investigator's sampling method. The investigation report supports the Department's use of a statistical sample. The investigation's history also shows taxpayer agreeing to the Department's proposed list of accounts from which to devise and compile the statistical sample, and to the Department's use of a statistical sample.

However, once the Department produced the sample and assessed additional use tax, Taxpayer objected to the final results. When presented with the Department's Agreement to Projected Audit Results, taxpayer refused to sign it.

The Department may, of course, examine the books, records, or other data bearing on the correctness of taxpayer's reporting or returns. IC § 6-8.1-4-2. The Department agrees that a recalculation of taxpayer's use tax liabilities could very well result in a different result than the one reached by the investigator. However, taxpayer erred in choosing an administrative hearing to explore statistical variances and methodologies. Having protested the investigation results, it is the taxpayer's burden to demonstrate that the sampling method is wrong. Taxpayer has argued for an alternative methodology but failed to demonstrate clear error on the part of the investigation. The Department finds that the investigator acted within his authority to provide a statistical sampling for the Tax Years.

Taxpayer did not rebut the correctness of the Department's assessment.

#### **FINDING**

Taxpayer's protest is respectfully denied.

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